Supreme Court, U.S.
FILED

No. 02 1688 JAN 14 2003

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IN THE
Supreme Court of the United States

CHARLENA SINGLETON,

Petitioner,

v.

AL CANNON, SHERIFF, CHARLESTON COUNTY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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SUPPLEMENTAL APPENDIX

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APPENDIX F

SCANNED

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Charlena Singleton,	)	C.A. No. 2:99-3636-18AJ
	)	
Plaintiff,	)	
	)	
-versus-	)	**REPORT AND**
	)	**RECOMMENDATION**
Charleston County Sheriff's Office, Al Cannon,	)	
	)	
Defendant.	)	

This action brought under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, et. *seq.*, and Title VII of the Civil Rights Act of 1964 (Title VII),42 U.S.C. § 2000e, by a former employee of defendant Charleston County Sheriff, Al Cannon (the Sheriff), proceeding *in forma pauperis,* is before the undersigned for a report and recommendation on the defendant's dispositive

motion filed February 14, 2000. 28 U.S.C. § 636(b).

The plaintiff, Charlena Singleton (Singleton), filed this case *pro se'* on November 2, 1999, against the Sheriff alleging that she was discriminatorily fired on September 9, 1997. The defendant was served on December 15, 1999, and when no answer was filed in a timely manner, the plaintiff, through her retained counsel, filed an affidavit of default on January 28, 2000, and moved for an Order of default on February 4, 2000. On February 14, 2000, the defendants filed a motion to dismiss the plaintiff's law suit for lack of subject matter jurisdiction. A hearing on the two motions was held on March 31, 2000, at which time the plaintiff filed a memorandum in opposition to the defendant's motion.

Consideration first turns to the plaintiff's motion for an Order of Default.

The entry of default and default judgment is governed by Federal Rule of Civil Procedure 55, which reads in pertinent part:

> (a) Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default.

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1. The plaintiff subsequently retained Mendel J. Davis, Esq., to represent her in this matter.

(b) Judgment. Judgment by default may be entered as follows:
(1) By the Clerk. When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if the defendant has been defaulted for failure to appear and if he is not an infant or incompetent person.
(2) By the Court. In all other cases the party entitled to a judgment by default shall apply to the court therefor ....

Generally, the entry of default and default judgment is disfavored because it prevents a plaintiff's claims from being decided on the merits. 10 Wright, Miller & Kane, Federal Practice and Procedure § 2681 (1983). "There is a strong public policy, supported by concepts of fundamental fairness, in favor of trial on the merits, see, e.g., Jackson v. Beech, 636 F.2d 831, 835 (D.C. Cir. 1980), particularly when monetary damages sought are substantial." Swink v. City of Pagedale, 810 F.2d 791, 792 n. 2 (8th Cir.1987), *cert. denied*, 483 U.S. 1025, 107 S.Ct. 3274, citing 10 Charles A. Wright, Arthur R. Miller & Mary K. Kane, Federal Practice and Procedure § 2693, at 482-85 (2d

Ed. 1983). Accordingly, entry of judgment by default is a drastic remedy which should be used only in extreme situations. Flaksa v. Little River Marine Construction Co., 389 F.2d 885 (5th Cir.), *cert. denied*, 392 U.S. 928, 88 S.Ct. 2287.

"Where a defendant appears and indicates a desire to contest an action, a court may exercise its discretion to refuse to enter default, in accordance with the policy of allowing cases to be tried on the merits." *See, e.g.*, Lee v. Brotherhood of Maintenance of Way Employees, 139 F.R.D. 376, 381 (D.Minn. 1991), citing 10 Charles A. Wright, Arthur R. Miller & Mary K. Kane, Federal Practice and Procedure § 2682, at 411 (2d Ed. 1983).

The court is required to exercise "sound judicial discretion" in deciding whether to enter default judgment. "This element of discretion makes it clear that the party making the request is not entitled to a default judgment as of right, even when defendant is technically in default." Id. The court should consider a number of factors in determining whether to enter default and default judgment, including: (1) prejudice to the plaintiff if default judgment is not granted; (2) whether the defendant has a meritorious defense; and (3) whether the defendant's delay was the result of culpable misconduct. *See e.g.*, Emasco Ins. Co. v. Sambrick, 834 F.2d 71, 74 (3d Cir. 1987).

In the final analysis, default judgments

are not favored in the law, and the entry of such a judgment is only appropriate where there has been a clear record of delay or contumacious conduct. *See,* e. *g.,* United States on Behalf of and for the Use of Time Equipment Rental and Sales, Inc. v. Harre, 983 F.2d 128, 130 (8th Cir. 1993).

Here the facts do not warrant the entry of default. There is no evidence of prejudice to the plaintiff by the short delay occasioned here, and the issues raised by the defendant appear to be meritorious. Accordingly, even though it appears that the defendant himself was less than diligent in attending to his legal affairs, default would not be appropriate.

Turning next to the defendants motion to dismiss, it appears that the defendant is asserting that this court lacks jurisdiction because the plaintiff has not filed this action in a timely manner.

Singleton submitted to the court with her complaint a copy of her right-to-sue letter dated February 2, 1999. Since this action was not filed until November 2, 1999, the defendant asserts that this action is untimely. The plaintiff in turn has responded citing her extensive efforts to find legal assistance to bring this action and asserts that she was "excusably ignorant of the filing requirements. She also contents that her delay in filing this action was the result of her, "lack of funds, lack of knowledge of the legal system and its requirements, and her inability to obtain assistance from any source. . ." Accordingly she

claims that the ninety-day period should be tolled.

No more than ninety (90) days before the commencement of a civil action for employment discrimination covered by the EEOC or the ADEA, the aggrieved party must have received a "Right-to-Sue" letter from the EEOC. 42 U.S.C. § 20OOe-5(f)(1); Davis v. Virginia Commonwealth Univ., 180 F.3d 626 at 628 (4th Cir. 1999). Generally, and specifically in this case, the notice of right-to-sue letter states on its face, "You may file a lawsuit against the respondent(s) under federal law based on this charge in federal or state court. Your lawsuit **must be filed WITHIN 90 DAYS of your receipt of this Notice;** otherwise, your right to sue based on this charge will be lost." (Emphasis in original).

The ninety-day filing period generally commences on the date that the aggrieved party actually receives the EEOC's right-to-sue letter. See, *e.g.*, Biester v. Midwest Health Servs., Inc., 77 F.3ci 1264, 1267 (10th Cir. 1996). Compliance with this time requirement is not a jurisdictional prerequisite; rather, it is a statutory precondition to suit that functions like a statute of limitations. Gonzalez-Aller Balseyro v. GTE Lenkurt, Inc., 702 F.2d 857, 859 (10th Cir. 1983). When the defendant denies or contests a timely filing, the plaintiff must prove this condition precedent.

> "[S]ummary judgment is proper 'if the pleadings, depositions, answers to interrogatories, and admissions on file,

together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the Moving party is entitled to a judgment as a matter of law.'" Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548 (1986) (quoting Fed.R.Civ.P. 56(c)). "Rule 56(e) therefore requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Id. at 324. In determining whether this showing has been made, the factual evidence and all inferences to be drawn therefrom are reviewed in a light most favorable to the party opposing the motion. See, Ross v. Communications Satellite Corp., 759 F.2d 355, 364 (4th Cir. 1985). Finally, summary judgment is not appropriate if the resolution of material issues depends upon credibility determinations. Davis v. Zahradnick, 600 F.2d 458 (4th Cir. 1979).

Here the defendant has challenged the timeliness of the suit, and the plaintiff has admitted the failure to file this action in a timely fashion. She seeks, however, to excuse the delay by pointing to her own limitations and inability to obtain counsel and to the local EEOC office's inability to give her more information than that set out in the Right-to-Sue letter.

Specifically, the plaintiff asserts in her various pleadings the following:

1. She was mislead by attorneys.

2. She met with approximately 27 attorneys at unspecified times who told her they did not have time to take the case, that her time to file had run, that they did not want to take her money if they could not help her, that they did not take cases in the Charleston area, or that she should go to the EEOC and amend her complaint. One attorney told her to tell the court that she had been mislead.

3. The right-to-sue letter did not include the address of any courts in which filing a lawsuit would be proper and did not include any information about the procedure for filing a Lawsuit. At some unspecified time she contacted the EEOC office in Greenville and in Charlotte asking for lists of court addresses where she could file her lawsuit, and she was told the EEDC did not provide this information. She contacted the EEOC in October, 1999, and she was advised to file the case even though time had expired.

4. During the last week in October 1999, an investigator told her the address of the federal court in Columbia. She contacted the court in Columbia the last week in October, and the clerk sent her papers to file. The clerk of court in Charleston allegedly told her, that it did not handle anything but criminal cases.

5. The plaintiff filed her complaint with this court in November 1999 immediately after receiving documents from the clerk of court.

Title VII's limitation period is not absolute, but is subject to "equitable modification." Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982). Notably, the doctrine of equitable tolling allows a plaintiff to avoid the bar of the statute of limitations if, despite all due diligence, she is unable to obtain vital information bearing on the existence of her claim. Hamilton v. Komatsu Dresser Indus., 964 F.2d 600, 605 (7th Cir. 1992) (citing Wheeldon v. Monon.Corp., 946 F.2d 533, 536 (7th Cir. 1991)). "A plaintiff's excusable ignorance of the filing deadline, when combined with a lack of prejudice to the defendant, will commonly make equitable tolling appropriate." Bracy v. Helene Curtis, Inc., 780 F.Supp. 568, 570 (N.D.Ill. 1992).

Equitable tolling is premised on the plaintiff's excusable neglect, which may or may not be attributable to the defendant. Further, when an administrative agency misleads a complainant, particularly one who is without the benefit of counsel, equitable tolling may be justified. See, e.g., Warren v. Department of the Army, 867 F.2d 11.56, 1160-61 (8th Cir. 1989) (permitting equitable tolling of the statute of limitations in Title VII action in part because of misleading right-to-sue letter issued by EEOC); Early v. Bankers Life & Casualty Co., 959 F.2d 75, 81 (7th Cir. 1992) (citing misleading conduct by the EEOC as a basis for equitable tolling); Blumberg v. HCA Management Co., 848 F. 2d 642, 644

(5th Cir. 1988) (finding that misleading information from the EEOC may justify equitable tolling) , *cert. denied,* 488 U.S. 1007, 109 S.Ct. 789, 102 L.Ed.2d 781 (1989); Martinez v. Orr, 738 F.2d 1107, 1111-12 (10th Cir. 1984) (finding equitable tolling appropriate where notice from EEOC misled pro se claimant regarding the finality of EEOC action).

The Fourth Circuit Court of Appeals has discussed the tolling of the limitations periods in the context of an EEOC claim as follows:

> The limitations period set forth in section 626(d) of the ADEA may be subject to equitable modification when warranted by the conduct of the employer. Such modification has two possible rationales: equitable tolling and equitable estoppel. Equitable tolling focuses on the plaintiff's excusable ignorance of the employer's discriminatory act. Equitable estoppel, in contrast, examines the defendant's conduct and the extent to which the plaintiff has been induced to refrain from exercising his rights. See, Naton v. California, 649 F.2d 691 (9th Cir. 1981).

Felty v. Graves-Humphreys Co. 785 F.2d 516 (4th Cir. 1986)

The facts of this case, however, are not

similar to those cases in which equitable relief has been granted a plaintiff.2

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2. The plaintiff in an attempt to bolster her position cites the opinion in Lane v. Wal-Mart Stores East, Inc. in which Wal-Mart attacked the plaintiff's administrative filing as untimely. The court dismissed the attack noting the plaintiff had filed within the 300 day period allowed for a deferral state, but as an aside discussed tolling. This discussion does not help the plaintiff, but is quoted here for completeness. "'While Wal-Mart correctly characterizes the Fourth Circuit's view that equitable tolling is 'a narrow limitations exception,' Olson v. Mobil Oil Corp., 904 F.2d 198, 201 (4th Cir. 1990), such a position does not preclude application of the doctrine to Lane's situation. Rather, the Fourth Circuit has recognized that the decision to grant such relief is within the discretion of the trial court and is dependent upon the particular circumstances of the case. See Cornett v. AVCO Fin. Servs., 792 F.2d 447, 450(4th Cir.1986)(interpreting the Supreme Court's decision in Oscar Mayer & Co. v. Evans, 441 U.S. 750, 99 S.Ct. 2066, 60 L.Ed.2d 609 (1979), as authorizing the discretionary application of equitable tolling); Citicorp Person-to-Person Fin. Corp. v. Brazell, 658 F.2d 232, 234 (4th Cir.1981) (recognizing that equitable tolling principles might be applicable under certain situations).

"Equitable tolling may be applied "'where the defendant has wrongfully deceived

or misled the plaintiff in order to conceal the existence of a cause of action"; or where plaintiff has been excusably ignorant of filing requirements." Scheller v. Hydrotherm, Inc., 728 F.Supp. 377, 382 (D.Md. 1989)(quoting English v. Pabst Brewing Co. 828 F.2d 1047, 1049-50 (4th Cir.1987)). The Fourth Circuit has appreciated that a plaintiff's excusable ignorance could result from reasonable reliance on incorrect information provided by a federal agency, such as the EEOC. See, Vance v. Whirlpool Corp., 716 F.2d 1010, 1013 (4th Cir. 1983) (holding that the district court properly refused to dismiss claim, as the plaintiff's late filing resulted from his reasonable reliance on a Department of Labor employee's incorrect information); Citicorp Person-to-Person Financial Corp., 658 F.2d at 234 ("[A] clear violation of [a] regulation by [the] EEOC might warrant the finding of a tolling effect.").

"In this Court, Judge Northrop stated that "sound equitable reasons" existed for tolling when a plaintiff relied upon an incorrect limitations period calculated by the EEOC. Cherrey v. Thompson Steel Co., 805 F.Supp. 1257, 1261 n. 1 (D.Md. 1992). Similarly, the Fourth Circuit determined that the 300 day period should be tolled when the plaintiff's tardy filing resulted from the delay of the complaint once it reached the EEOC's office. Waiters v. Robert Bosch Corp., 683 F.2d 89, 92 (4th Cir. 1982) ('[The plaintiff] did everything required of him by the statute;

In Balwin County Welcome Center v. Brown, 466 U.S. 147 (1984), the United States Supreme Court explained the difference, "This is not a case in which a claimant has received inadequate notice, see Gates v. Georgia-Pacific Corp., 492 F.2d 292 (9th Cir. 1974); or where a motion for appointment of counsel is pending and equity would justify tolling the statutory period until the motion is acted upon, see, Harris v. Walgreen's Distribution Center, 456 F. 2d 588 (6th Cir. 1972) ; or where the court has led the plaintiff to believe that she had done everything required of her, see, Carlile v. South Routt School District RE 3-J, 652 F.2d 981 (10th Cir. 1981). Nor is this a case where affirmative misconduct on the part of a defendant lulled the plaintiff into inaction. See, Villasenor v. Lockheed Aircraft, Corp., 640 F.2d 207 (9th Cir. 1981); Wilkerson v. Siegfried Insurance Agency Inc., 621 F.2d 1042 (10th Cir. 1980); Leake v. University of Cincinnati, 605 F.2d 255 (6th Cir. 1979). The simple face is that Brown was told three times what she must do to preserve her claim, and she did not do it. One who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence."

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had his charge been properly processed, the charge would have satisfied the filing period.').

"Any delay on Lane's part in filing a verified charge esulted from her reasonable reliance on incorrect information provided to her by the EEOC." 69 F.Supp.2d 749, 754.

The undisputed facts here are that the plaintiff spoke to any number of attorneys. She knew of the time period in which to file her lawsuit, but she did not file it. The mere fact that plaintiff is proceeding *pro se* does not excuse her non-compliance with the statutory requirements for pursuing her claim. *See,* Baldwin County Welcome Center v. Brown, 466 U.S. 147 (1984); Vernon v. Cassadaga Valley, 49 F.3d 886 (2d Cir. 1995); Roberson v. Bowie State College, 899 F.Supp. 235 (D.Md. 1995). While the plaintiff seeks to neutralize her responsibility by casting vague aspersions on the efforts of the EEOC, the court and the numerous attorneys who took their time to review her file and talk with her, she presents nothing which indicates that she is entitled to equitable relief. She was not mislead by her employer, the EEOC, any attorney or by the court. The notice from the EEOC and every party told her to file her claim in the district court in a timely manner, but she did not.

In Baldwin County Welcome Center v. Brown, the United States Supreme Court cautioned, "Procedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts out of a vague sympathy for particular litigants. As we stated in Mohasco Corp. v. Silver, 447 U.S. 807, 826, 100 S.Ct. 2486, 2497, 65 L.Ed.2d 532 (1980), '[i]n the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of

the law.'" 466 U.S. 147, 152, 104 S.Ct. 1723, 1726

Accordingly, for the aforementioned reasons, it is recommended that the action be dismissed as untimely and the respondents be granted judgment as a matter of law.

Respectfully submitted,

s/
Robert S. Carr
United States Magistrate Judge

Charleston, South Carolina
April 11, 2000